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No. 03-377

Supreme Court, U.S.
FILED
APR 15 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

KOONS BUICK PONTIAC GMC, INC.,

Petitioner,

v.

BRADLEY NIGH,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF THE MICHIGAN BANKERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37.2, the Michigan Bankers Association (MBA) moves for leave to file the accompanying brief in support of the position taken by Petitioner Koons Buick Pontiac GMC, Inc. (Koons Buick). Counsel for both parties have consented to the filing of this brief.

The MBA, a nonprofit corporation, is the principal trade organization for the commercial banking industry in Michigan. The MBA membership includes all of the commercial banks having their principal offices in Michigan. The MBA acts on behalf of its member banks in matters affecting their trade or business.

The issue of whether Congress intended to repeal the 35-year-old $1,000 cap on the statutory penalty for a non-mortgage, non-lease violation of the Truth in Lending Act (TILA) is of great importance to the MBA's members, who are subject to TILA and its implementing regulations when engaged in their core business of consumer lending. The MBA's unique analysis of the 1995 amendment to TILA will assist this Court in its consideration of this important issue.

The Motion for Leave to File the accompanying Brief of the Michigan Bankers Association as *Amicus Curiae* should be granted.

Respectfully submitted,

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QUESTION PRESENTED

The *amicus curiae* will address the following question:

Did Congress impliedly repeal the $1,000 cap on the statutory penalty for a non-mortgage, non-lease violation of the Truth in Lending Act (TILA) when it amended TILA to provide a $2,000 cap on the statutory penalty for a TILA violation involving a closed-end home mortgage loan?

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

The interest of the *amicus curiae* is described in the accompanying motion for leave to file this brief.

STATEMENT OF THE CASE

The facts relevant to the legal issue presented are as follows:

1. From 1968 until 1995, the statutory penalty for a TILA violation was capped at $1,000 in 15 U.S.C. § 1640(a)(2)(A). *Purtle v. Eldridge Auto Sales, Inc.*, 91 F.3d 797, 800 (6th Cir. 1996); *Cowen v. Bank United of Texas*, 70 F.3d 937, 941 (7th Cir. 1995); *Mars v. Spartanburg Chrysler Plymouth, Inc.*, 713 F.2d 65, 67 (4th Cir. 1983); *Dryden v. Lou Budke's Arrow Fin. Co.*, 661 F.2d 1186, 1191 n.7 (8th Cir. 1981).

2. In 1995, Congress amended Section 1640(a)(2)(A) to increase the statutory penalty cap to $2,000 for TILA violations involving a closed-end home mortgage loan. *See* CONG. REC. S14568 (daily ed. Sept. 28, 1995) (statement of Senator Mack) ("the bill raises the statutory damages for individual actions from $1,000 to $2,000"); CONG. REC.

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

H9516 (daily ed. Sept. 27, 1995) (statement of Rep. McCollum) (same).

3. Nowhere in the 1995 amendment's text or legislative history did Congress indicate it was repealing or abrogating the $1,000 statutory penalty cap that had applied to a non-mortgage, non-lease TILA violation since 1968. Pet. 6-7.

4. In 2000, Respondent Nigh purchased a used Chevrolet Blazer from Petitioner Koons Buick. He financed the purchase through Koons Buick. After several restructurings of the deal and Nigh's failure to make a single installment payment, Nigh returned the vehicle and sued Koons Buick in federal court under TILA. Pet. 7-9.

5. A panel of the United States Court of Appeals for the Fourth Circuit held that the 1995 amendment impliedly repealed the $1,000 statutory penalty cap for a non-mortgage, non-lease TILA violation, and it affirmed a $24,192.80 jury award on Nigh's claim for a TILA statutory penalty. Pet. 9-11. This award represented twice the finance charges that Nigh would have paid had he made all applicable installment payments to Koons Buick as promised. In fact, Nigh made no payments, and he suffered $0 in actual damages.

SUMMARY OF ARGUMENT

This Court should hold that Congress's 1995 TILA amendment did not impliedly repeal the $1,000 cap on the statutory penalty that has been in place for a non-mortgage, non-lease violation of TILA since 1968.

The 1995 amendment did nothing more than tack additional language on to Section 1640(a)(2)(A), thus creating the new $2,000 statutory penalty cap for a home mortgage TILA violation. If Congress had placed the exact same language in a new subparagraph (a)(2)(C), rather than adding it to the existing language in subparagraph (a)(2)(A), there would be no dispute. This innocent Congressional choice of textual position, with nothing more, should not be construed as specific intent to abrogate a statutory penalty damage cap that has been in place for more than 35 years, particularly where there is not a shred of legislative history that suggests a Congressional intent to do so.

The panel's interpretation also raises the same troubling due process concerns this court addressed last term in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, (2003). The panel's judicial repeal of the statutory penalty cap (a) imposes liability without regard to culpability, (b) creates a substantial disparity between penalty and actual damages, and (c) results in significant disparities with the damages awarded in comparable cases. The potential constitutional problems inherent in the panel's construction of Section 1640(a)(2)(A) provide a separate and additional reason to reject that construction.

Finally, the panel's interpretation is nothing short of a disaster for consumers and the economy. The considerable risk that results from uncapped liability for non-mortgage, non-lease TILA violations will inevitably be borne by consumers in the form of increased credit costs. This harm can be avoided simply by enforcing Congressional intent as evidenced in the 1995 amendment and Section 1640 itself.

ARGUMENT

I. THE PLAIN TEXT OF THE 1995 AMENDMENT DID NOT REPEAL THE $1,000 CAP FOR A NON-MORTGAGE, NON-LEASE VIOLATION OF TILA.

As Koons Buick explains in its merits brief, the plain language of Section 1640 mandates reversal of the Fourth Circuit's decision. The $1,000 statutory penalty cap applies to "this subparagraph," a term that Congress uses to refer to the third-level subdivision of a statutory section that begins with a capitalized letter.[2] Since the statutory penalty for a non-lease, non-mortgage transaction is contained in and defined by Section 1640(2)(A) – a third-level subdivision beginning with a capitalized letter – the $1,000 cap applies to such a transaction.

The exact same result is reached by examining Congressional intent as embodied in the plain text of the 1995 amendment. The amendment added a third clause to Section 1640(a)(2)(A), and moved an "or" to accommodate the new clause. The additional text is very limited – providing only that in pursuing a TILA claim, a plaintiff is entitled to actual damages plus:

> (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2,000.

[2] *See, e.g.*, United States Congress Data Dictionary of Legislative Documents, available on the official House of Representative website at http://xml.house.gov/subparagraph.html (defining the term "subparagraph").

15 U.S.C. § 1640(a)(2)(A)(iii). The limited action Congress took in enacting the 1995 amendment did not modify any of the existing statutory text, other than moving the "or" to accommodate the new clause (iii). All the amendment accomplished was the addition of new language regarding the penalty cap on a home mortgage transaction.

If, instead of amending Section 1640(a)(2)(A), Congress had simply pasted the text of Section 1640(a)(2)(A)(iii) into a new Section 1640(a)(2)(C), there would be no dispute. The language of Section 1640(a)(2)(A) would be interpreted as it always has been, and the panel below would have followed the Fourth Circuit's decision in *Mars*, i.e., the statutory penalty for a non-mortgage, non-lease TILA transaction would have remained capped at $1,000. Congress's innocuous decision to place the new home mortgage cap in clause (A)(iii). rather than in a new subparagraph (C) or some other part of the statute, cannot be read as a wholesale revision of the existing penalty cap for a non-mortgage, non-lease consumer loan, a topic the amendatory language does not even purport to address. Had Congress intended the result the panel attributes to the 1995 amendment, then Congress would have certainly undertaken a more comprehensive revision of the entire Section 1640(a)(2)(A). Focusing on the amendment's language demonstrates the complete absence of any Congressional intent to abrogate the cap.

While a repeal of the cap on the statutory penalty for a non-mortgage, non-lease TILA violation would have been a far greater change in the statutory penalty scheme than the simple doubling of the cap for a home mortgage violation, there is not a shred of indicia that Congress even contemplated such a repeal, much less intended one. To begin, the legislative history is clear that the purpose of

the 1995 TILA amendment was to increase the statutory penalty cap for a lender who violated TILA in a closed-end home mortgage loan to $2,000 from the $1,000 cap that had otherwise applied to such loans under clause (i). *See* CONG. REC. S14568 (daily ed. Sept. 28, 1995) (statement of Senator Mack) ("the bill raises the statutory damages for individual actions from $1,000 to $2,000"); CONG. REC. H9516 (daily ed. September 27, 1995) (statement of Rep. McCollum) (same). The purpose had nothing to do with the statutory cap judicially abrogated by the panel.

In addition, it is undisputed that Congress did not express the intent the panel impliedly attributes to the amended statutory language. *See* Br. Opp. 10-11 (noting that "Koons Buick is correct that Congress did not state either way whether it intended the 1995 amendment to affect the scope of the term 'this subparagraph'"); Pet. App. 13a ("It could well be, as Judge Gregory concludes, that Congress did not intend to alter the statutory cap applicable under subparagraph (A)(i) when it amended the statute in 1995."); Pet. App. 20a ("[T]here is no evidence that Congress intended to override the Fourth Circuit's longstanding application of the $1,000 cap to both (2)(A)(i) and (2)(A)(ii)") (Gregory, J., dissenting); Elwin Griffin, *Searching for Truth in Lending: Identifying Some Problems in the Truth in Lending Act and Regulation Z*, 52 BAYLOR L. REV. 265, 305 (2000) ("Congress did not change its mind about the meaning of that word [i.e., "subparagraph"], but instead neglected to make the necessary adjustment when it added a third part to accommodate transactions secured by real estate.").

Absent indicia of such legislative intent, this Court presumes that the Congressional revision did not work a change in the underlying substantive law. *Sale v. Haitian*

Ctrs. Council, Inc., 509 U.S. 155, 176 (1993) (rejecting asserted interpretation of statutory amendment because "[i]t would have been extraordinary for Congress to make such an important change in the law without any mention of that possible effect" in the legislative history); *Clarke v. Sec. Indus. Ass'n, Sec. Pac. Nat'l Bank*, 479 U.S. 388, 405-06 (1987) (rejecting asserted change in statutory meaning by changing certain words when there was "nothing in the legislative history . . . indicating that this change in the wording had substantive significance"); *McElroy v. United States*, 455 U.S. 642, 650 n.14 (1982) (concluding that "Congress intended nothing by the change in language" "[b]ecause the legislative history contains no indication that the variation in the language had changed the meaning" of the statute).

That presumption is further buttressed by the numerous pre-1995 judicial interpretations of Section 1640(a)(2)(A), all of which construed the $1,000 cap as applying to "this subparagraph," i.e., a consumer loan and consumer lease described in subparts (i) and (ii) of subparagraph (a)(2)(A). *See, e.g., Purtle*, 91 F.3d at 800; *Cowen*, 70 F.3d at 941; *Mars*, 713 F.2d at 67; *Dryden*, 661 F.2d at 1191 n.7. It is a well-established maxim of statutory interpretation that Congress is charged with knowledge of these judicial interpretations of the statute and is assumed to have adopted them in its re-promulgation of the statute. *Keene Corp. v. United States*, 508 U.S. 200, 212 (1993) (citing *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)). For all these reasons, the panel's interpretation should be rejected.

II. THE PANEL'S INTERPRETATION UNNECESSARILY IMPLICATES DUE PROCESS PROBLEMS.

When interpreting a statute, a court should avoid construing the statutory language in such a way that raises a question of constitutionality. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979) (a statute should not be construed in such a way "that in turn could call upon the Court to resolve difficult and sensitive questions" of constitutional law). But the panel's interpretation of Section 1640(a)(2)(A) raises a significant question as to the Section's constitutionality under the Fifth Amendment's due process clause. Accordingly, the panel's interpretation should also be rejected on this secondary ground.

Last term, in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513 (2003), this Court analyzed the interplay between the Fourteenth Amendment's due process clause and the imposition of punitive damages under state law. Although punitive damages "serve the same purposes as criminal penalties," *id.* at 1520, defendants subjected to such damages in civil cases "have not been accorded the protection applicable in a criminal proceeding," *id.*, thus raising constitutional concerns. In striking down the punitive damage award in *State Farm*, this Court reiterated its three "guideposts" for reviewing the constitutionality of punitive damages:

> (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

Id.; *accord BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

Although not strictly applicable to this federal statutory penalty case, the Court's punitive damage guidelines are instructive in analyzing the due process implications of the panel's interpretation here. First, in the vast majority of TILA claims, the lender has neither intentionally nor fraudulently misrepresented the applicable finance charge, but has merely run afoul of the more than 250-page Regulation Z, which interprets TILA. *See* 12 C.F.R. Part 226. Such a technical violation does not evidence "an indifference to or a reckless disregard of the health or safety of others," *BMW*, 517 U.S. at 1521; rather, it is a simple mistake that causes only economic harm, if it causes harm at all.

Second, under the panel's interpretation of the 1995 amendment, the disparity between actual harm suffered and the statutory penalty can and often will be extreme. Here, for example, Nigh suffered $0 in actual damages. Assuming for purposes of mathematical calculation that the jury awarded $1 in nominal, actual damages, the $24,192.80 statutory penalty is more than 24,000 times actual damages. *Cf. State Farm*, 538 U.S. at 605-06 ("Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.").

Third, the panel's decision creates a substantial disparity between a statutory penalty imposed for a non-mortgage, non-lease TILA violation and other types of TILA violations. Whereas the penalty for a TILA violation in a home mortgage loan is now capped at $2,000, and the penalty in the consumer lease context is capped at $1,000, there is no hard cap for a non-mortgage, non-lease violation under the panel's ruling. So in Nigh's case, the jury was permitted to award more than $24,000 in a statutory penalty. Future cases may yield even more disparate results.

These is no logical basis for these disparities, demonstrating both the due process concerns that the panel's decision raises, and the rather absurd results the panel attributes to Congressional intent. For all these reasons, the panel's reading of the statute should be rejected.

III. THE PANEL'S DECISION IS A PUBLIC POLICY DISASTER.

Despite the best efforts of the banking industry to comply in all respects with TILA's requirements, the fact remains that Regulation Z (which interprets TILA) occupies nearly 250 pages in the Code of Federal Regulations. *See* 12 C.F.R. Part 226. The government regulatory scheme is breathtaking in its scope and complexity, making it nearly impossible for a financial institution to ensure that a transaction is letter perfect. As Respondent's counsel notes, "[n]early every car transaction contains one or more

violations of a statute or regulations."[3] *See also Hearings on S. 650 before the Subcomm. on Financial Institutions and Regulatory Relief of the Senate Comm. on Banking, Housing and Urban Affairs*, 104th Cong., 1st Sess., at 9 (1995) ("the complexity of Regulation Z is such that the FDIC cited more than 2,700 of the 3,500 institutions that [it] examined in 1994 for at least one violation").

Given the $2 billion in total outstanding consumer credit in the United States as of January 2004 (*see* http://www.federalreserve.gov/releases/g19/Current (visited Apr. 1, 2004), the potential penalty exposure for otherwise innocent TILA violations will be astronomical if the Fourth Circuit's judicial repeal of the statutory damage cap is upheld. This will invariably drive smaller institutions out of the consumer credit market entirely, and force larger institutions to pass on the costs to their customers in the form of higher finance charges. The resulting economic harm to consumers and the national economy can be avoided simply by enforcing Congressional intent as evidenced in the 1995 amendment and Section 1640 itself.

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[3] http://www.alexandriacitywebsite.com/Blankingship.htm (visited 3/30/04).

CONCLUSION

The judgment of the court of appeals should be reversed.

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APRIL 2004